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COMMISSION ON THE STATUS OF WOMEN
Open-ended Working Group on the
Elaboration of a Draft Optional
Protocol to the Convention on
the Elimination of All Forms of
Discrimination against Women
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ELABORATION OF A DRAFT OPTIONAL PROTOCOL TO THE
CONVENTION ON THE ELIMINATION OF ALL FORMS OF
DISCRIMINATION AGAINST WOMEN

Draft report of the Open-ended Working Group (Part II)*

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57. One delegation emphasized the requirement, contained in the element, that no inference could be drawn from the recommendation of interim measures for the Committee's decision on the merits.

Element 11

58. With regard to the formulation that the State party would be "informed confidentially", several delegations emphasized that, in the light of the purpose of the procedure as individual procedure, the identity of the author would need to be revealed to the State party to enable it to investigate the allegations, remedy the situation, and to provide full information to the Committee to determine admissibility, including the exhaustion of domestic remedies. It was also stated that the State party would be able to implement any recommendations of the Committee only if it knew the identity of the complainant. Only in exceptional cases, when there appeared to be danger for the author, could this requirement be waived or other cautionary measures taken.

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such as interim measures. In that sense, confidentiality in the element would seem to refer to confidentiality vis-à-vis third parties.

59. While some delegations, pointing to a similar provision in the International Convention on the Elimination of All Forms of Racial Discrimination, emphasized the need to obtain the person's consent before revealing her identity to the State party, they agreed that in most cases, the State party would need to know the author's identity to assume its responsibilities. The experience of the above Convention showed that only in one out of seven cases had the identity of the author not been revealed to the State party.

60. While some delegations proposed that it should be left to the Committee to determine, in its rules of procedure, a reasonable time period for the State party to provide replies, other delegations supported the inclusion of a specified period of time. Reference was made to the First Optional Protocol (six months) and the Convention against Racial Discrimination (three months). Several expressed a preference for a six-month time-limit.

61. Several delegations welcomed the proposals for mediation contained in the element. It was, however, stressed that the terms of any settlement would need to be in accordance and compatible with the State party's obligation under the Convention; be acceptable to both parties; and be arrived at without pressure on the author to settle. Those concerns would need to be addressed in relevant provisions of the optional protocol or in the rules of procedure.

62. With regard to the confidential nature of the report on a settlement, some delegations emphasized the importance of a transparent procedure, which would encourage also other States parties to take relevant action, and which would build up the Committee's case law. While the name of the author could be withheld, the results of the settlement should be made public in the report of the Committee, if the author and the State party so wish.

63. One delegation proposed to divide element 11 into two separate elements, whereby the second element would consist of the last sentence.

64. Some delegations pointed out that a State party needed to be informed of the full substance of a communication, and not simply of "the nature of the communication", as suggested in element 12. Thus, it was proposed to state that "the communication as such" be transmitted to the State party. In fact, both parties, i.e. the State party and the complainant, needed to have the full documentation of a case.

65. Some delegations proposed that the State party be represented in meetings of the Committee when matters affecting it were under consideration. One delegation suggested that any means would be acceptable which ascertained the ability of the State party to participate fully and actively. Such a concept could be contained either in the optional protocol, or in the rules of procedure. Other delegations found that it would be inappropriate for the parties to be present at the consideration of a communication. If there were an exception, then it could be only at the specific request of the Committee.

Element 12

66. With regard to a provision that the Committee would examine a communication in the light of information received, inter alia, "from other relevant sources", most delegations emphasized that only information submitted by the author and the State party should be considered. One delegation, in referring to element 7, stated that, as only victims should have the right to submit communications, it would be only the victim and the State party that could provide information on a case.

67. Other delegations pointed out that other relevant sources of information could shed further light on cases where women were disempowered or unable to provide information. Any such information, which could be derived from sources such as reports or deliberations of other United Nations mechanisms, would need to be made available to the parties concerned. Regarding other sources of information one delegation noted that, as communications would be confidential vis-à-vis third parties during consideration, only general background information could be made available to the Committee. Such information might be more usefully provided in the framework of the reporting procedure under article 18 of the Convention.

68. Many delegations agreed that a visit to the territory in the examination of a communication would be inappropriate. One delegation pointed out that such a provision would belong to elements 17-24. Some suggested that, on an exceptional and case-by-case basis, this could be envisaged. There was, however, no need to include such a provision in the optional protocol. One delegation stressed the importance of that aspect, as demonstrated by the successful use of the method under the European system. It was also available in the Inter-American system. It was emphasized that such a visit would only take place with the agreement of the State party. One delegation raised the question of the resource implication of such a provision.

69. With regard to the examination of the communication by the Committee, and in relation to suggestions made by some delegations under element 11 that the State party be present, several delegations emphasized that, in both cases the procedure should be of a written nature and without the presence of the State party. Some delegations stated that, while in principle this should be a written procedure, the Committee should have the power to conduct oral hearings with both parties. The possibility of oral testimony should also not be excluded.

70. One delegation stated that the use of the term "adopt" in this element was inappropriate.

Element 13

71. While some delegations noted that there was no precedent for a provision on the recommendation of remedial measures in cases of non-compliance with treaty provisions in other human rights instruments, they welcomed the addition of the element, especially with regard to reparations. Its inclusion would provide an opportunity, as was the case with certain other elements, for the progressive development and strengthening of international human rights law. Some

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delegations noted the consistency of the element with the practice of human rights treaty bodies. The well-established practice of the Committee on the Elimination of Discrimination against Women to adopt recommendations at the conclusion of the consideration of States parties' reports was noted. Reference was also made to General Assembly resolution 41/120, establishing the principle that new international human rights instruments must be consistent with the existing body of international human rights law and may not fall behind existing standards.

72. Some delegations emphasized the importance of the Committee's ability to make recommendations on steps necessary to implement the Convention. At the same time, delegations agreed that the Committee was not a judicial body, and thus its views were of a recommendatory, albeit authoritative, character. The legal responsibility of States parties, resulting from ratification, to remedy violations was emphasized. Some delegations stated that it should be left to the States parties to determine the appropriateness of the remedial measures. Others doubted that the Committee should have the power to recommend remedial measures.

73. Some delegations noted that the intention of the element would be that the State party take the necessary steps to give effect to its obligations under the Convention, i.e. that action be taken by the State party at the national level. Several delegations suggested that the formulation of the element should be drafted in a way to suggest dialogue, rather than judgement.

74. Several delegations identified a lack of clarity in the use of the term "adequate reparation", including clarity as to who would make the determination. Some proposed the deletion of this term. Information on the understanding of the term "reparation" was provided based on a study conducted by an expert of the Subcommission on the Prevention of Discrimination and Protection of Minorities.

75. One delegation proposed the formulation: "... appropriate remedy, including, if need be, adequate reparation". Reference was also made to paragraph 124.d of the Platform for Action for possible language on rehabilitation.

76. Some delegations suggested that the period of time within which a State party would inform the Committee about measures taken should be made specific. A few months was suggested as appropriate.

77. Some delegations pointed out that the question of the justiciability of all provisions of the Convention would have a bearing on the formulation of this provision.

Element 14

78. Several delegations expressed their support for the inclusion of an element on follow-up, and for the intent and formulation of the element. That would be in accordance with the practice of the Human Rights Committee, and the European system.

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79. In order to clarify that the element covered the implementation phase of the Committee's views in a case, one delegation, supported by several others, proposed the following formulation: "... concerning implementation of such measures ...".

80. One delegation, in welcoming the element, suggested that element 13 be also cast along similar lines. The need for ongoing dialogue between the Committee and the State party, and the inclusion of relevant information in the framework of reporting, were welcomed by several delegations.

Element 15

81. The Chairperson of the Committee on the Elimination of Discrimination against Women informed the Working Group of an error contained in element 15 to the extent that it should not refer to a "confidential" report. The element should thus read:

The Committee would, in its report, summarize the nature of communications received, its examination of them, the replies and statements of the States parties concerned and its views and recommendations.

82. Based on this clarification, delegations supported the element. They emphasized the need to publicize the availability of the procedure, the work of the Committee, and to disseminate widely the views of the Committee in order to develop jurisprudence on women's human rights. The inclusion of information about the work under the optional protocol in the Committee's annual report would also be in line with the practice of other treaty bodies, who included in their annual reports a summary of cases after their conclusion and the Committee's findings.

83. Some delegations proposed that, instead of a summary of the nature of the communication, the element should use the formulation of article 14.8 of the International Convention on the Elimination of All Forms of Racial Discrimination, i.e.: "The Committee shall include in its annual report a summary of such communications and, ...".

Element 16

84. Several delegations supported the establishment of a working group of the Committee. This would be in line with the practice of the Human Rights Committee, and would be an effective and efficient method for preparing the work of the Committee as a whole. At the same time, several delegations pointed out that the term "its responsibilities", used in the element, was inappropriate as the Committee would not delegate any authority to the working group. A working group could simply have responsibility for preparing or expediting the handling of communications for the Committee as a whole. They emphasized that only the Committee as a whole could have the power to adopt decisions, including decisions on admissibility of communications. Thus, the following formulation was proposed: "responsibilities for the preparation of consideration of cases ...".

85. Some delegations, noting that the element covered simply a method of work of the Committee, proposed that the provision should be dealt with in the Committee's rules of procedure, instead of in the optional protocol.

86. Some delegations noted the need for further clarification of the nature, function, role and power of a working group of the Committee. The different types and functions of working groups established under human rights treaty bodies, and under Charter-based procedures, were identified.

General points

87. One delegation proposed the addition of an element to cover the Committee's rules of procedure under the optional protocol.

88. One delegation noted that a number of elements proposed for inclusion in the optional protocol reflected the current practice of human rights bodies. Doubts were expressed whether those needed to be included in an optional protocol, or should be left to the Committee to elaborate upon in its rules of procedure. The development of a rigid instrument should be avoided.

Element 17

89. A number of delegations supported the inclusion of an inquiry procedure in an optional protocol as a means of dealing with serious and systematic violations of women's human rights. The existence of a similar procedure under the Convention against Torture, article 20, and at regional levels, was noted. Others expressed doubts about the inquiry procedure proposed in suggestion 7 and suggested that alternatives for achieving the intention behind an inquiry procedure should be explored fully. A number of delegates noted that any new instrument should enjoy the broad acceptance of States parties.

90. Several delegations suggested that possibilities within the Convention on the Elimination of All Forms of Discrimination against Women itself, which would apply to all States parties, should be pursued, such as developing an inquiry procedure under the Committee's existing mandate and rules of procedure. The establishment of an early warning mechanism under the Committee on the Elimination of Racial Discrimination was cited as an example. Introduction of time-bound follow-up to the Committee's concluding comments on States parties reports under article 18 was suggested. Other delegations recommended further study of the possibilities for addressing serious and systematic violations in the framework of reporting under article 18, including follow-up to the Committee's concluding comments, and the request of reports in accordance with article 18.1 (b).

91. Some delegations proposed that element 7 be drafted to enable the Committee to deal with situations of serious and systematic violations under a communications procedure. Universal accession to existing instruments should be promoted. Others emphasized the need to strengthen existing procedures, including the communications procedure of the Commission on the Status of Women and the 1503 procedure.

92. Some delegations raised the question of possible overlapping between an inquiry procedure and existing mechanisms, especially with the communications procedure of the Commission and the 1503 procedure. Others noted the differences in, and complementarity of, these procedures in regard to the proposed inquiry procedure. They expressed concerns about the length of the process under the 1503 procedure, particularly for violations which needed immediate action. The intergovernmental character of the Commission's communications procedure and of the 1503 procedure on the one hand, and of the expert character of the proposed inquiry procedure on the other, were noted. While some noted a general lack of attention under existing procedures to gender-specific violations, others emphasized the need to mainstream women's human rights. Some noted that Charter-based procedures and other treaty-based procedures, were based on different instruments, not on the Convention on the Elimination of All Forms of Discrimination against Women.

93. Regarding the formulation of element 17, several delegations noted that the threshold for admissibility would need to be both serious and systematic violations, i.e. there would be a high threshold to initiate an inquiry. Some noted that an inquiry procedure would enable the Committee to deal with patterns of widespread violations of women's human rights and allow it to address a broader range of issues, including structural causes of violations, than would be the case under the individual procedure. Reliable information would be required to start the procedure. A few delegations expressed concern at the optional nature of many aspects of the proposed inquiry procedure, underlining the need for more active investigation into serious and systematic violations.

94. A number of delegations stated that some provisions of the Convention might lend themselves more to an inquiry procedure than to an individual complaints procedure. A more comprehensive discussion of the merits of the inquiry procedure would thus depend on the development of the communications procedure. Some delegations noted that the "serious and systematic" criteria would need to apply both to alleged violations and to alleged failures to comply. Other delegations found the "failure" category to be redundant and one considered the scope of element 17 to be too broad if it were to be applied to all of the rights covered by the Convention.

Element 18

95. The question was raised as to what mechanisms would be available in case of non-cooperation of a State party.

Element 19

96. The need for including a time-limit was raised.

Element 20

97. Some delegations noted that only the State party concerned would participate in the inquiry, not "States parties". As to the intention of confidentiality in this element, it was suggested that, contrary to the individual communications procedure, those who submitted information leading to

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an inquiry procedure would not be involved in its conduct, but that this would be limited to the Committee and the State party.

Element 21

98. Some delegations noted a lack of clarity in the meaning of the term "satisfactory outcome". Some delegations raised the question as to the Committee's attitude in case a State party would not provide the requested information.

Element 22

99. Some delegations raised the question whether the Committee, at the completion of the process, would be empowered to publish its report even without the agreement of the State party. The practice of the Convention against Torture was noted, which consulted the State party, but was not required to obtain agreement from the State party.

Element 23

100. One delegation considered to be redundant the requirement that a State party undertake to assist the Committee, as such cooperation was expected to result from ratification.

Element 24

101. Several delegations emphasized the need to publicize widely the optional protocol, and the following additions, or alternative formulations, were proposed: "... making the provision of the optional protocol widely known in their countries", or "the communication and inquiry procedure should be made public as widely as possible". While the role and participation of United Nations bodies and agencies in such efforts were stressed, some delegations recommended that this should be addressed in a resolution rather than in the optional protocol itself.

Element 26

102. One delegation, referring to a recent amendment to the Convention regarding the Committee's meeting time, suggested that this matter should be left to the Committee to decide in its rules of procedure. Other delegations inquired whether there might be a need for additional annual sessions and sought clarification on the amount of time that might be necessary for the Committee to discharge its duties under an optional protocol. Regarding possible sources of funding for the Committee's work under an optional protocol, it was noted that all treaty bodies were funded from the regular budget of the United Nations.

103. Several delegations noted a lack of clarity regarding the scope of the "expert legal advice", including questions regarding the composition of the Committee. One delegation noted that, upon the adoption of the optional protocol, States parties would need to review such expertise when electing members of the Committee. While the Secretariat would be expected to support

the work of the Committee, the expertise would also need to be in the Committee itself.

Element 27

104. Several delegations suggested that it might be useful to specify the number of ratifications that would be required for the optional protocol to enter into force. While one delegation proposed that it could enter into force after five instruments of ratification had been deposited, other delegations suggested that the intention should be to have as many States parties as possible ratify the optional protocol upon adoption.

Element 28

105. While some delegations proposed that ratifying States parties should be required to accept both procedures covered in an optional protocol, others suggested that, similar to article 28 of the Convention against Torture, States parties should have the opportunity to "opt out" of one of the two procedures. It was also noted that, to the extent that such a possibility was included in an international instrument, it was only with regard to the inquiry procedure. One delegation recommended that, even if the possibility existed, ratification of the optional protocol ought to be without reservations; others stated that reservations might be needed to achieve a large number of ratifications, but that incompatible reservations should not be allowed. It was noted that the First Optional Protocol did not contain a no-reservations clause. Delegations also referred to the discussion on reservations held under element 5.

C. Discussion on justiciability

106. In addition to its consideration during the general exchange of views and of the elements contained in suggestion 7, the Working Group held a further discussion on the question of justiciability. Statements were heard by two members of the Human Rights Committee on this matter, followed by an exchange of views with the Working Group.

107. A number of delegations argued that all provisions of the Convention should be covered by an optional protocol, and that the question of justiciability should not be an obstacle to its preparation. While noting different degrees of specificity in the Convention of rights and of States parties' obligations, i.e. to grant rights, to undertake activities, and to take appropriate measures, they pointed to the legal character of the treaty, which needed to be executed in good faith by States parties. They argued that it should be left to the treaty body to determine in each case, and in a reasonable way, whether a provision was justiciable or not, and whether a State party had fulfilled its treaty obligations.

108. The objective of the Convention, i.e. equality of women and men in the enjoyment of rights and the elimination of discrimination, and the purpose of an optional protocol, i.e. to make the Convention more effective, would make it possible for the supervisory body, on the basis of concrete cases, to determine State party compliance. While noting a State party's margin of discretion in

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implementing its obligations and determining measures to be taken, it was also pointed out that a State party's actions in implementing its treaty obligations were subject to meaningful scrutiny by a treaty body. The important role of the optional protocol as a means of recourse for women, and to strengthen enforcement of women's rights, was stressed.

109. Some delegations noted that the classical distinction into civil and political rights as justiciable, and economic, social and cultural rights as non-justiciable could, in the light of practice, case law and academic writings, no longer be maintained. Elements from both could be found in either category. Empowering the Committee to determine justiciability on a case-by-case basis would also enable the further development of case law on the question of justiciability of human rights provisions. It might also stimulate States parties to create effective national remedies and recourse mechanisms for women.

110. While recognizing the potential for difficulties in determining justiciability of some provisions under an individual communications procedure, a number of delegations cautioned against a categorization of treaty provisions into justiciable and non-justiciable. They noted that that would seriously impair the integrity and unity of the Convention and establish a hierarchy of more and less important rights. The right to equality and non-discrimination had in itself been accepted as justiciable by existing human rights mechanisms, including the International Covenant on Civil and Political Rights and Optional Protocol and the International Convention on the Elimination of All Forms of Racial Discrimination. Regional mechanisms, such as the European Convention, the Inter-American Convention, and the African Charter, contained different types of rights, offered individual communications and/or inquiry procedures, but did not distinguish between justiciable and non-justiciable rights.

111. Other delegations expressed their doubts about the inclusion of all the provisions of the Convention under an individual communications procedure. While they agreed that certain rights were quite specific and would thus lend themselves to such complaints, others were of a general nature where the basis for individual recourse would be difficult to determine given the State party's margin of appreciation with regard to measures to be taken. Articles 3, 5 and aspects of 10 were mentioned as examples where difficulties in implementing an individual right to petition would potentially arise. The comparison with the national level, where civil and political rights were justiciable, was made.

112. In that regard, some delegations were of the view that any decision on justiciability should not be left to the Committee on a case-by-case basis, but should be settled among member States. Differences between various legal systems in determining exhaustion of domestic remedies and of standing would also need to be addressed. The question of determining the exhaustion of domestic remedies with regard to programmatic provisions of the Convention was raised, including the assessment of exhaustion of non-judicial remedies. The impact of rights on third parties, i.e. on private individuals, of provisions of the Convention would also need to be addressed.

113. Hesitating to categorize the provisions into justiciable and non-justiciable, one delegation suggested that, instead, the purpose of the optional protocol would need to be further reviewed and its applicability

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determined. An admissibility criterion could be the reliable evidence of a consistent pattern of gross violations of the rights guaranteed in the Convention, along the lines of the 1503 procedure. Another delegation suggested that a solution could be sought through the determination of the Committee's mandate, power, and type of recommendations it could pronounce at the end of a communication procedure. In that regard, it was proposed that those would be of a recommendatory, non-binding nature, allowing the State party ultimately to reach a conclusion different from the Committee's. While under the more specific provisions, the Committee's views could be very specific, in others, the process would be more in the form of a dialogue between the Committee and the State party.

114. While some delegations, noting the quasi-judicial nature of an optional protocol, noted the need for legal expertise of the Committee members, others pointed to the composition of the Committee on the Elimination of Racial Discrimination, and possibilities for a more just and fair decision with the participation of non-lawyers.
